



COMMONWEALTH of VIRGINIA

Department of Health

M. NORMAN OLIVER, MD, MA
STATE HEALTH COMMISSIONER

PO BOX 2448
RICHMOND, VA 23218

TTY 7-1-1 OR
1-800-828-1120

November 18, 2019

Jonathan M. Joseph, Esquire
Christian & Barton, LLP
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095

**RE: A Petition Attempting to Show Good Cause
as to why Botetourt Health Care, LLC
Should be Made a Party to the Administrative Proceedings on
Certificate of Public Need
Request No. VA-8432
Richfield Living**

Dear Mr. Joseph:

I am denying the petition attempting to show good cause submitted by Botetourt Health Care, LLC ("Botetourt Health") in relation to the above-captioned application for a COPN.

Botetourt Health's petition has not demonstrated good cause for the reasons stated in the enclosed analysis – a recommended decision prepared by an adjudication officer, after conducting an informal fact-finding conference on the petition and reviewing the record as it relates to the petition. I am adopting the recommended decision and making this case decision based on my review of this matter, and my review of the adjudication officer's recommended decision. I concur and agree with the enclosed recommended decision.

In order to show good cause under subsection G of Virginia Code § 32.1-102.6, a petitioner must show "that (i) there is significant relevant information not previously presented at and not available at the time of the public hearing, (ii) there have been significant changes in factors or circumstances relating to the application subsequent to the public hearing, or (iii) there is a substantial material mistake of fact or law in the Department's Division of Certificate of Public Need staff's report on the application . . ." Botetourt Health, under this law, has not shown good cause based on an analysis of the allegations made in its petition, as discussed in the enclosed recommended decision.



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Botetourt Health, then, is not a party to the proceedings by which a public need determination will be made on the application for a COPN referenced above.

In accordance with Rule 2A:2 of the Rules of the Virginia Supreme Court, an aggrieved party to an administrative proceeding that chooses to appeal a case decision, must file within 30 days after service of the case decision, a signed notice of appeal with "the agency secretary." I would consider such a notice sufficiently submitted if it were addressed or otherwise sent to my Office, on the Thirteenth Floor of the James Madison Building, 109 Governor Street, Richmond, Virginia 23219. Under Rule 2A:2, when service of a decision is "accomplished by mail," three days are added to the 30-day period established under the Rule.

You are receiving a photocopy of this letter, along with the enclosed recommended decision in accordance with Virginia law.*

Sincerely,

A handwritten signature in black ink that reads "M. Norman Oliver MD". The signature is written in a cursive style with a large, stylized "M" and "O".

M. Norman Oliver, MD, MA
State Health Commissioner

Enclosure

cc: Matthew M. Cobb, Esq.
Amanda Lavin, Esq.
Office of the Attorney General
Erik Bodin, Director
VDH, Office of Licensure and Certification
Douglas R. Harris
VDH, Adjudication Officer

* Va. Code § 2.2-4023 provides that the signed original of this final agency case decision "shall remain in the custody" of the Department, so the petitioner is receiving a photocopy of the original letter and recommended decision.

**Recommendation to the
State Health Commissioner
Regarding a PETITION SEEKING TO SHOW GOOD CAUSE
Submitted by BOTETOVRT HEALTH CARE, LLC,
d/b/a Carrington Place at Botetourt ("Botetourt Health")
In Relation to:**

**Certificate of Public Need (COPN)
Request No. VA-8432
RICHFIELD LIVING
Roanoke
Planning District (PD) 5
Build a New 116-Bed Nursing Facility in Roanoke**

Introduction

This is a recommended decision, submitted to the State Health Commissioner (hereinafter, the "Commissioner") for his adoption. This recommended decision follows an informal fact-finding conference (IFFC) conducted in accordance with the Virginia Administrative Process Act (APA), Virginia Code § 2.2-4000, et seq.,¹ and review of the Virginia Department of Health (Department) administrative record pertaining to the above-referenced petition and parts of the administrative record relating to the application from Richfield Living.

This recommended decision provides legal and factual bases for the Commissioner, as called for in the APA, to inform the good cause petitioner, "briefly and generally in writing[] of the factual or procedural basis" for making a case decision on the petition to show good cause, as called for in the APA.²

Authority

Article 1 of Chapter 4 of Title 32.1 (§ 32.1-102.1 *et seq.*) of the Virginia Code (the "COPN law") addresses medical care facilities and provides that "[n]o person shall commence any project without first obtaining a certificate issued by the Commissioner."³ The COPN law provides a definition of "project," under which the application submitted by Richfield Living falls.⁴

The COPN law provides that "any person showing good cause" shall be "a party to the administrative proceedings, or case," in which an applicant requests approval of a project, such as the project captioned above (the "proposed project").⁵ Botetourt Health seeks to be such a party in relation

¹ Specifically, Va. Code § 2.2-4019.

² Va. Code § 2.2-4019 (A).

³ Va. Code § 32.1-102.3 (A).

⁴ Va. Code § 32.1-102.1, definition of "[p]roject."

⁵ Va. Code § 32.1-102.6.

to the review of the project, a status that would give it certain rights that appertain under the APA and the COPN law. The COPN law defines good cause to mean:

. . . that (i) there is significant relevant information not previously presented at and not available at the time of the public hearing, (ii) there have been significant changes in factors or circumstances relating to the application subsequent to the public hearing, or (iii) there is a substantial material mistake of fact or law in the Department [of Health, Division of Certificate of Public Need, (DCOPN's)⁶] staff's report on the application"⁷

The present recommended decision may rely upon "case law and administrative precedent," including past decisions of the Commissioner (incorporating adjudication officer's recommended decisions prepared for routine review) made in sustaining or denying past petitions to show good cause, to a degree consistent with the APA.⁸

Context

Botetourt Health is "person seeking to be made a party to the case [i.e., the project proposed by Richfield Living] for good cause."⁹ Botetourt Health presents two multi-factorial allegations that good cause exists. The proving of just one of these allegations would result in a finding of good cause, thereby allowing Botetourt Health to acquire the status of being a good cause party to the administrative proceedings.¹⁰

If the Commissioner determines that Botetourt Health has not shown good cause, it will not acquire such status; however, its petition and submittals will be records, among many, in the totality of the administrative record relating to the projects, and in accordance with the COPN law and regulations.¹¹

The present recommended decision addresses only the issue whether Botetourt Health has shown good cause, whereby it would obtain the right to intervene in the administrative proceedings conducted on the project proposed by Richfield Living. The present document does not touch upon the issue of whether Richfield Living has demonstrated public need for its proposed project.

Background to and Posture of the Botetourt Health Petition

1. Following routine review, on May 20, 2019, DCOPN released its staff report and recommendation (the "DCOPN staff report") on the project proposed by Richfield Living. The

⁶ DCOPN is the division within the Department of Health that comprises the Commonwealth's professional health facilities planning staff.

⁷ Va. Code § 32.1-102.6 (G).

⁸ Va. Code § 2.2-4019. (B).

⁹ Va. Code § 32.1-102.6 (E)(3).

¹⁰ Va. Code § 32.1-102.6 (D).

¹¹ Under Virginia regulation, "[a]ny person affected by a proposed project" may submit, for inclusion in the record, "opinions, data and other information" before the Commissioner's "final action" on an application for a COPN.

DCOPN staff report includes that division's recommendation that the Commissioner approve the project.

2. On May 24, 2019, Botetourt Health submitted a petition seeking to show good cause as to why it should be made a party in the case of the application submitted by Richfield Living.
3. An informal fact-finding conference to allow Botetourt Health an opportunity to substantiate its petition orally (a "good-cause IFFC") was convened on August 13, 2019, in Henrico County, pursuant to the APA, the COPN law, Virginia regulations and a guidance document.¹²
4. A transcript of the good-cause IFFC was created and made available. The petitioner and the applicant have filed post-IFFC documents and briefings discussing the good cause petition and the application.
5. The close of the administrative record relating to good cause and the project, on its merits, occurred, with the agreement of the applicant and assent of the petitioner, on September 17, 2019.

Discussion of the Allegations Made in the Petition

Allegation One. Factual Basis #1. Pursuant to the law defining good cause, set out above, Botetourt Health first alleges that good cause exists due to DCOPN committing a substantial material mistake of fact because the DCOPN staff report contained the statement that "[t]he proposed project, along with the remaining phases of Richfield [Living]'s multi-phased plan, will result in the improved distribution of beds within the Commonwealth and 30 beds being removed from the existing PD 5 surplus."

Botetourt Health states that "[t]his COPN Application is limited to the construction of a new 116 bed facility. It is a substantial mistake of law for the DCOPN Staff Report to rely on projects separate from the one at issue and even projects currently under other COPN review in order to make a recommendation regarding this Application."

Botetourt Health further states that "[t]his COPN Application itself will not result in the removal of 30 beds from the existing PD 5 surplus and it is a substantial mistake of law for the DCOPN Staff Report to heavily rely on this alleged fact several times throughout the Staff Report in order to support its recommendation."

I believe this mistake is alleged in error. DCOPN can only consider the current application. DCOPN relied only on appropriate facts in making its recommendation. To make mention of the larger picture is hardly a substantial material mistake of any kind. Rather, doing so gives the reader a better view of the larger context and the ability to make a well-rounded decision on the project at hand. Good cause does not rest on this part of the first allegation.

¹² Va. Code §§ 2.2-4019, 32.1-102.6, 12 VAC 5-220-230 and VDH Guidance Document ADJ-004.1. The good-cause IFFC was followed by an IFFC-in-chief, in which the applicant orally presented the merits of its project.

Factual Basis #2. Botetourt Health next alleges that DCOPN erred in concluding that “while approval of the proposed project may have some impact on the staffing of existing facilities, that impact is not likely to be substantial.” The beds proposed for transfer already exist and are staffed. Richfield Living intends to transfer its current staff to the new nursing home, causing little disruption in the employment market. DCOPN’s statement is one with which Botetourt Health may have a disagreement, but it does not rise to the level of a substantial material mistake of law.

Factual Basis #3. Botetourt Health next makes known its disagreement with DCOPN’s statement in its staff report that the status quo is not a reasonable alternative to the proposed project without giving a factual basis for this conclusion. DCOPN’s statement was borne out of a clear recognition of the benefits and amenities a new facility, over the existing facility, which is approximately 45 years old, would bring. These benefits are detailed in the staff report. DCOPN’s statement is one with which Botetourt Health may have a disagreement, but it does not rise to the level of a substantial material mistake of law.

Allegation Two. Factual Basis #1. Botetourt Health states that The DCOPN staff report “failed to distinguish the difference between the acceptance of any payor source and the reservation of a certain number of beds for Medicaid recipients. . . . It is a substantial mistake of fact to conclude that all payor sources will have more access to private rooms when the underlying facts demonstrate that any bed that is certified for Medicaid will also be certified for Medicare.” The beds are currently dually certified, would continue to be so, and are only being relocated. DCOPN did not commit a substantial and material mistake of fact.

Factual Basis #2. Botetourt Health states that the DCOPN staff report “errs as a matter of fact in concluding that the proposed project is not likely to have a significant negative impact on the utilization, costs or charges of other providers of nursing home care.” Richfield plans to transfer staff to the new facility, but it also intends to relocate the patients who occupy the nursing home beds to its new campus. Richfield is not planning to expand the nursing home inventory in PD 5. Given Richfield’s plans, I do not see how any mistake here could be substantial or material.

Factual Basis #3. Botetourt Health states that the DCOPN staff report references “numerous letters of support for the proposed project,” and points out that these letters “only mention Richfield’s past successes and fail to articulate support for this particular project.” Articulated support from the community is only one of many items that must be considered in making a dispassionate public need determination and is not determinative. Whether a letter mentions past successes or clearly show support for a current one, noting success in the past is certainly relevant to what an applicant will do in the future, and any error in the DCOPN staff report here does not rise to the level of being significant or material.

Conclusions of Law and Recommendation

I have reviewed the good cause petition filed by Botetourt Health, and portions of the administrative record relating to the good cause petition.

For the reasons discussed above, I find the Botetourt Health petition has not demonstrated good cause. None of the mistakes it seeks to identify are substantial, defined to mean important or essential,

and none are material, defined to mean having real importance or of great consequence, determinative. The allegations in the petition fail to show a basis for finding good cause. **The petition is not sufficient to allow Botetourt Health to become a good cause party to the proceedings by which the applicant's project is reviewed. The petition should be denied.**

Adoption by the Commissioner of the present recommended decision serves only to complete the identification of the parties to the administrative proceedings underway in relation to the project proposed by Richfield Living.

Respectfully submitted,



Douglas R. Harris, JD
Adjudication Officer

November 1, 2019

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